International *Jus Cogens* in National Law

Alina Miron[1]

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A. International *Jus Cogens* and Domestic Analogies

1. In 1969, the Vienna Convention on the Law of Treaties (VCLT) consecrated the international *jus cogens* in its Art. 53 and 64. Yet half a century later, the definition, foundations and functions of this concept are still open to debate. International *jus cogens'* core ideas are reminiscent of well-established domestic concepts of imperative law (*jus publicum*) and *ordre public* (public policy) (Alexidze 233, Kolb (2015) 1). Like the imperative rules of domestic legal orders, international *jus cogens* cannot be derogated from. And like public order, it designates a special set of norms protecting the basic values of the international community (comp. Hoffmeister & Kleinlein and Gebauer). However, *jus cogens* differs significantly from its domestic cognates. It differs from *jus publicum* on more than one account. In a vertical legal order like the national one, the *jus publicum* is the product of the will of a superior authority. There is nothing alike in the international legal system, where States are equal and no superior authority can assert jurisdiction over them. Moreover, in

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domestic law, the liberty of contract is subject to public law. By contrast, on the international level, the principle of sovereign liberty is an essential foundation of treaty law, operating in favour of States' freedom to create by consent whatever obligations they deep appropriate. International *jus cogens* also differs significantly from the domestic *ordre public*, which deploys its effects in private international law, as a limit to the application of foreign law or to the recognition of foreign judicial decisions. International *jus cogens* is essentially a public law concept, instituting a hierarchy of norms in an otherwise horizontal legal system, erecting a limit to the autonomy of consent, laying the ground for an aggravated regime of responsibility for internationally wrongful acts and so on. *Ordre public*'s and *jus cogens*' functions are thus fundamentally different.

2. On the international plane, these domestic analogies served as a springboard to emancipate international *jus cogens* from its natural law origins, with an aim to bringing it within the realm of positive law (*Tladi*, 1st Report, paras 18-27; Gomez Robledo 17-36). However, this emancipation did not lead to the recognition of *jus cogens* as a new formal source of international law, alongside treaties, custom, general principles of law and resolutions of international organizations. On the international legal plane, the nature of *jus cogens* remains therefore debated: for some, the concept covers a set of substantial rules reflecting basic values (*Tladi*, 1st Report, paras 18-27 with references) or merely "a legal technique which attaches to a series of norms to confer on them a particular resistance to derogation" (Kolb (2013) 3). These fluctuating conceptions make difficult to ascertain the place of international *jus cogens* in the national legal orders.

B. Recognition of international *jus cogens* in national law

1. Importance of domestic jurisprudence in the absence of express constitutional recognition

3. Being a new and uncertain concept of international law, *jus cogens* is generally not expressly mentioned in national constitutions. The only notable exception comes from the 1999 Federal Constitution of the Swiss Confederation (Switzerland), whose Art. 139-3, 193-4 and 194-2 refer to "mandatory provisions of international law" ("*les règles impératives du droit international*"; "*die zwingenden Bestimmungen des Völkerrechts*"). The absence of express recognition has not been an obstacle to its adoption by domestic judges elsewhere. Some scarce references appear in in the 1970-1990 in domestic case-law (in particular from the United States), but the years 2000 mark a turn, due to important developments in

international criminal law (in 1998, the adoption of the Rome Statute of the ICC and a specific recognition of the prohibition of torture as a *jus cogens* rule by the ICTY in *Furundžija*). At present, there are several hundred domestic decisions from diverse legal traditions, referring to *jus cogens* or to peremptory rules of international law. This contrasts with the still prudent use of *jus cogens* in international jurisprudence. In States like France, where political authorities still question if not the existence of *jus cogens* as a concept, at least its nature and content, domestic judges make nonetheless reference to it (comp. Conseil d'Etat, opinion of 21 Feb. 2003 and Cour de cassation, *La Réunion aérienne et autres c. Jamahiriya arable libyenne*). This emancipation from the position of political authorities attests to the universality and general acceptance of this concept.

4. The question then arises what the domestic legal foundations for the recognition and application of international *jus cogens* are. In principle, two parameters are important for defining the situation of international norms in the domestic legal orders. First, the monist or dualist tradition of a particular legal order determines whether an international norm is immediately applicable in the national legal system or whether it needs incorporation by domestic legislation. Second, domestic legal systems make a distinction between the formal sources of internal law, granting them a different status. Thus, in most of them, custom is of immediate application and no incorporation is required ("international law is part of the law of the land"). This is not necessarily the case of treaties. The prevailing view among internationalists is that *jus cogens* represents a particular category of custom, characterized by the reinforced *opinio juris* according to which the norm is not only obligatory, but does not suffer any derogation. However, for the purposes of domestic application, *jus cogens* does not entirely share the status of custom. A few courts concluded to an automatic incorporation of *jus cogens* applying by analogy the status of international custom. For instance, the Court of Appeal for Ontario held that "customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation (…). This is even more so where the obligation is a peremptory norm of customary international law, or *jus cogens*." (*Bouzari v. Islamic Republic of Iran*, para. 65)). Yet, the Court also noted that "a peremptory norm of customary international law or rule of *jus cogens* is a higher form of customary law." (*ibid*, para. 86). In this respect, the Court dissociated the domestic status of *jus cogens* from the one of customary international law.

5. The reason for such dissociation is that each domestic legal system has its own hierarchy of norms, where the place of international law sources is also specified. In most of them, international custom rarely prevails over domestic legislation, whereas treaty law often enjoys a superior hierarchical status (Shelton (ed) 5-7). If *jus cogens* enjoyed the status recognized to international custom, this would lead to the absurd result that it would become inferior to treaties, which would be the very negation of one of the core-element of *jus cogens* – namely its superior legal status. No domestic decision has ever followed this path of argumentation. On the contrary, even if some of them held that *jus cogens* norms are of customary origin (Italy, South Africa, United States), the concept was systematically invoked to highlight the superior legal status of the international rule at stake, prevailing over other international and domestic rules.

6. Among the few courts specifically addressing the question of domestic reception of *jus cogens*, many prefer to refer cumulatively to the constitutional norm of reception of general principles of law and to constitutional principles protecting human rights. For instance, German Constitutional Court relied cumulatively on Art. 1-2 of the Basic Law which recognizes inviolable and inalienable human rights and on Art. 25-1 which provides that "The general rules of international law shall be an integral part of federal law". Combining the two, the Court concluded that "the Basic Law also adopts the gradual recognition of the existence of mandatory provisions" (*East German Expropriation* case, para. 97). Similarly, the Supreme Court of Russia referred cumulatively to Art. 15-4 ("The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system") and to Art. 17-1 and 18 which recognize "the rights and liberties of man" to conclude that, for the purposes of Russian domestic system; "[t]he commonly recognised principles of the international law shall imply the basic imperative norms of the international law accepted and recognised by the international community of States as a whole, the deviation from which is inadmissible." (*Re Khodorkovskiy* ; see also *On Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction*). On the overall, national jurisprudence recognizes the concept of *jus cogens*, even in the absence of an express constitutional consecration. At the same time, this recognition does not rely exclusively on the traditional forms of the *rapports de systèmes*, which pass through the domestic incorporation of formal sources of international law, but also

through the assimilation with substantive principles, protected by the constitutions (like the protection of basic human rights).

2. Domestic pronouncements on the nature of jus cogens

7. Alongside the national sources of reception, domestic judges may also rely on the international foundations of *jus cogens*. Most of them refer to Art. 53 of the VCLT, but this reference is of limited scope and is generally used as an example of the international recognition of *jus cogens* (*Yousuf v. Samantar*; *Siderman de Blake v. Republic of Arg.*; *Suresh v. Canada*; Colombia- Decision C-291) alongside other sources (like the ILC Articles on State responsibility (Germany: *East German Expropriation case*; Switzerland: *A. v. Office of the Attorney general of Switzerland*), international jurisprudence (*Kaunda and Others v. President of the Republic of South Africa*; *Siderman de Blake v. Republic of Arg.*; Colombia- Decision C-291) or even the doctrine of the most highly qualified internationalists (*A. v. Office of the Attorney general of Switzerland*). Some judges make further inquiries into the binding force of *jus cogens* and the nature of the concept. Thus, the US Court of Appeal of the 9th circuit, while accepting that "*jus cogens* is related to customary international law (the direct descendant of the law of nations)", also insisted on the differences separating them, in particular on the fact that State consent cannot be the source of such biding force:

> "Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. (…) [They] create norms known as *jus dispositivum* (…) In contrast, *jus cogens* 'embraces customary laws considered binding on all nations,' (…) and 'is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations,' (…). Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent." (*Siderman de Blake v. The Republic of Argentina* quoting international doctrine).

In the same vein, the Constitutional Court of Colombia considered that State consent could not be basis of the binding character of *jus cogens*, since the purpose of this normative category was precisely to transcend it:

> "The norms of *jus cogens*, or peremptory norms of international law, are rules which, by their fundamental nature, hold a special hierarchical status within the body of rules of international law, and therefore cannot be ignored by States, thus limiting their freedom to conclude treaties and adopt unilateral acts." (Decision C-291, para. 2.2.1, our translation)

8. Instead of rejecting the voluntarist approach, some courts adopt the objectivist view, according to which *jus cogens* reflects fundamental values of the international community. The Supreme Court of Argentina stated that the purpose of *jus cogens* was to "protect States from agreements concluded against some values and general interests of the international community of States as a whole" (*Arancibia Clavel*), while the High Court of Kenya referred to "the international public order" (*Kenya Section of the International Commission of Jurists v. Attorney General & Another*). In the same vein, the German Constitutional Court held that "[t]hese are rules of law which are firmly rooted in the *legal conviction of the community of states*, which are indispensable to the existence of public international law, and the compliance with which all members of the community of states may require" (*East German Expropriation* case para. 97, emphasis added). In the absence of consensual criteria for determining the fundament values of international community, there is a risk however for domestic judges to vehiculate a subjective, unilateral view of when an international law norm reaches that status. As the Supreme Court of Canada put it, "[p]eremptory norms develop over time and by general consensus of the international community. This is the difficulty in interpreting international law; it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community" (*Suresh v. Canada*, para. 61). To minimize the risk of subjectivity, domestic judges might rely for that purpose on international law references, although, as will further be seen, this is not always their preferred method.

C. Definition of international *jus cogens* by domestic jurisprudence

1. Criteria and methods for establishing international jus cogens

9. The criteria of *jus cogens* are much debated on the international plane (Tladi, 2n Report). One could hardly expect domestic judges, who come from different legal traditions, with different degree of openness to international law, to provide a harmonized jurisprudence in this respect. Schematically, one may discern three attitudes when it comes to defining *jus cogens* and identifying the norms enjoying this quality. The argumentative way corresponds to the attitude of those domestic judges who draw the general criteria from Art. 53 VCLT, in particular on the non-derogable characteristic, then attempt to apply them to particular norms. The adoptive method consists in relying on existing case-law (both national and international) or even, at times, on the works of international jurists and deduce from these the existence of a particular *jus cogens* norm. Evidence of international practice and of universal recognition

of the non-derogatory character being difficult to adduce, the demonstrative and adoptive methods are generally combined. Finally, there is the assertive way, consisting of proclaiming the *jus cogens* status of some norms, without thorough inquiry into the underlying justifications.

10. A decision of the Constitutional Court of Colombia illustrates well the argumentative method. After establishing that: "the criteria for the recognition of a rule of international law as a rule of jus cogens are strict. According to article 53 of the 1969 Vienna Convention, such rules must not only meet the conditions for recognition as rules of international law in the first place, but also the additional requirements for recognition as mandatory or peremptory rules by the international community as a whole - the so-called 'double recognition' process. These requirements require consensus of a majority of States, regardless of their cultural and ideological differences, on their peremptory nature." (Decision C-291, para. 2.2.1, our translation). The Supreme Court of Canada looked for indicia of non-derogability and considered that the non-derogatory status of torture could be deduced from "the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from" (*Suresh v. Canada*, para. 65).

11. The adoptive method is even more often present. When it comes to ascertaining the peremptory character of a particular norm, judges would refer to ICJ judgements (e.g.: the *dicta* in *Barcelona Traction, Light & Power Co*, the *Genocide case (Bosnia and Herzegovina v. Serbia)*, but also *Corfu Channel* and *Military and paramilitary activity in Nicaragua and against Nicaragua*, and of course *Jurisdictional immunities*). In the conflict opposing the Italian courts to the ICJ on the question of State immunity in civil procedures for reparation of gross human rights violations, the former considered the ICJ conclusions to be authoritative and considered that they could not "interpret the imperative and non-derogable character of *jus cogens*, since the International Court of Justice has exclusive and absolute competence over the matter" (Italy, decision no 238/2014). One may find cross-references to decisions from other domestic legal orders. The High Court of Kenya referred to the *Pinochet* decision of the British House of Lords and to the *Eichmann* decision of the Supreme Court of Israel to establish universal jurisdiction over international crimes constituting violations of *jus cogens* norms. The United States Court of appeals for the fourth circuit relied on the difference of

jurisprudence among the Italian and British highest courts to reject the lifting of immunities in civil suits (in *Yousuf v. Samantar*).

12. The assertive method may be illustrated by the *Kadi* decision of the Court of First Instance of the European Union, which drew the quick conclusion that all "fundamental rights of human persons [are] covered by *jus cogens*" (*Kadi* case, 2005, paras 238, 282). Another form of assertive method is the one adopted by the US courts in their landmark cases *Siderman de Blake* and *Princz* in which, after quoting and briefly analysing Art. 53 VCLT, overwhelmingly relied on US sources (either previous decisions or the Restatement (Third) of Foreign Relations Law as an authoritative codification of international law) to assert the peremptory character of norms like the prohibition of torture, genocide and crimes against humanity. Their conclusions are certainly right, but this line of argumentation is inappropriate to establish the existence of an *international jus cogens* norm.

2. Examples of jus cogens *norms*

13. Domestic courts declare quite often that certain international norms enjoy *jus cogens* status. Whether they are also ready to draw consequences *sub judice* from these declarations, that is another question, which will be addressed in the next section. This being said, they rarely concern norms other than universal standards protecting human rights. One example may be found in decisions of the Russian Constitutional Court who considered that "[t]he universally recognized principles of international law [which, in the Court's terminology, are synonym of *jus cogens*] include, *inter alia*, the principle of universal respect for human rights and the principle of fulfilment of international obligations in good faith." (Ruling n° 5 (2003)). However, it is hard to see how the principle of *pacta sunt servanda* could qualify as *jus cogens* norm. The Constitutional Court of Russia clearly holds an extensive view of *jus cogens* norms, including among them the principles protecting sovereign equality of States (*Judgment 12-P/2016*).

14. Other courts are more cautious in asserting the *jus cogens* status of particular norms. Relying on pronouncements by international courts, most of them include in this category fundamental human rights, in particular those which are declared to be non-derogable even in times of emergency or war. Some decisions establish thus a clear correlation between non-derogable human rights and *jus cogens* norms:

> "[It] is important to bear in mind that an important indication of the imperative or *jus cogens* nature of a given rule of international law is provided by the fact that the rule enshrines human rights guarantees that are not derogable during states of emergency." (Constitutional Court of Colombia, Decision C-291, our translation)

15. Therefore, numerous decisions characterizing the prohibition of torture as *jus cogens* relied on its non-derogable character (eg: Supreme Court of Canada, referring to Art. 2-2, 3 and 16 of CAT and Art. 33 of the Refugee Convention, held that "the clear prohibitions on torture in the CAT [was not] intended to be derogable" (*Suresh v. Canada*); see also Italy, Decision 279/2013; Decision 6 N° 46634 ; US: *Siderman de Blake v. The Republic of Argentina*; Canada: *Bouzari v. Islamic Republic of Iran* and *Suresh v. Canada*; United Kingdom: *Affaire R., ex parte Pinochet v. Bartle and Others*). The same can be said about the prohibition of genocide, of war crimes and of crimes against humanity (US, *Alexis Holyweek Sarei et al. v. Rio Tinto PLC and Rio Tinto Limited*; Kenya: *Section of the International Commission of Jurists v. Attorney General*). Seeking to dissipate the confusion resulting from past cases, the Colombian Constitutional Court noted that only the essential principles of humanitarian law are *jus cogens* and it identified three of them: some "(i) the principle of distinction between civilians and combatants, (ii) the principle of precaution, and (iii) the principle regarding humane treatment and respect for basic guarantees and safeguards to which civilians and persons uninvolved in the conflict are entitled." (Decision C-291). By contrast, derogable human rights such as the right to property (Germany: *East German Expropriation* case) and the right to an effective remedy protected by Art. 6 and 13 ECHR and Art. 14 of the 1966 Covenant do not enter the category of norms of *jus cogens* (Switzerland: *Al Dulimi*, para. 8.4).

D. Functions of international *jus cogens*

16. On the international level, the main function of *jus cogens* identified in Art. 53 and 64 VCLT is to invalidate treaties violating peremptory norms. But *jus cogens* now deploys effects also in the field of State responsibility, which provides for an aggravated regime of responsibility in case of serious breaches of obligations under peremptory norms (Art. 40, 41 ARSIWA 2001). These functions are however marginal in domestic jurisprudence, whose main concern is to draw consequences in the field of judicial guarantees for the protection fundamental human rights.

1. Jus cogens *and domestic criminal jurisdiction*

17. As a corollary of the *jus cogens* character of the prohibition of genocide, of crimes against humanity and of torture, some courts asserted a duty to prosecute international crimes (see Weatherall, 303-308). Yet, international *jus cogens* proved not to be a too power tool in the fight against impunity. Indeed, when it comes to prosecuting a State's own nationals, the domestic judges will generally rely on criminal law provisions defining those international crimes and providing for their regime. When it comes to judging persons who are not a State's nationals and when the crimes had taken place abroad, thus asserting a form of universal jurisdiction, specific developments of international criminal law and the adoption of the ICC Statute provide a firmer foundation than the uncertain *jus cogens*. The concept may nonetheless remain domestically relevant in the areas not covered by this body of law – either for prosecuting crimes which are not embodied in the Rome Statute (France: *Jamahiriya arabe libyenne,* in relation to terrorism). It was equally invoked to extend to corporations the principle of universal jurisdiction in civil claims for gross human rights violations under the *Alien Torts Statute* (US, *Alexis Holyweek Sarei et al. v. Rio Tinto PLC and Rio Tinto Limited*).

2. Jus cogens *and immunities*

18. Immunities constitute however an important obstacle when it comes to prosecuting foreign officials and providing remedies for gross human rights violations. Unsurprisingly, many of the domestic decisions deal with the question of *jus cogens* as a possible obstacle to immunities. The overall picture is however blurred. A distinction should be drawn between immunities in criminal proceedings and in civil proceedings.

19. *Immunities in criminal proceedings.* There is no unanimous view, even among judges from the same legal order, that violations of *jus cogens* norms limit a State's official right to invoke immunities *in limine litis*. The US case-law is illustrative of these fluctuations. As stated by the US Court of appeal for the 4th circuit, "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims." (*Yousuf v. Samantar,* citing in support *Sarei v. Rio Tinto, Siderman de Blake*; *Enahoro v. Abubakar*). At the opposite end, other courts of appeal consider that accusations of war crimes do not automatically lead to the lifting of immunity (cf. *Matar v. Dichter* and *Devi v. Rajapaksa* deferring to Executive's suggestion that head-of-state immunity be allowed for individual accused of international crimes; *Belhas v. Ya'alon*, granting immunities to a retired

head of Israeli army intelligence). After an in-depth analysis of developments in international law (conventions, ILC codification, domestic jurisprudence), the Swiss Federal Criminal Court detected a trend in the law of nations in favour of rejecting immunities claims in case of violations of *jus cogens* norms (including for the Heads of State). However, it also acknowledged that this evolution has not necessarily crystallized into a customary rule:

> "[I]t is undeniable that there is an explicit trend at the international level to restrict the immunity of (former) Heads of State vis-à-vis crimes contrary to rules of *jus cogens*. (…) This trend in international law is also reflected at the national level, where a similar evolution to put an end to impunity for the most serious crimes can be observed. (…). [Considering the ILC's work on the immunity of State officials] what emerges from the report is the Commission's caution in carefully addressing the issue of immunity in order to achieve an acceptable balance between the need to ensure the stability of international relations and the need to avoid impunity of the perpetrators of serious crimes under international law. (…)". (*A. (Kahled Nezzar). v. Office of the Attorney general of Switzerland* – a case for torture brought against the former defence minister of Algeria; the Court finally rejected the claim to immunity on the basis of a teleological interpretation of domestic legislation).

20. *Immunities in civil proceedings*. While some national courts pierced the veil of official-acts immunity to hear civil claims against foreign officials alleging *jus cogens* violations, most of the times the *jus cogens* exception was rejected in the civil context (*inter alia*, UK: *Jones v. Saudi Arabia*; US: *Yousuf v. Samantar*; Canada: *Bouzari v. Islamic Republic of Iran*). Similarly, domestic courts also rejected it in civil proceedings against foreign States (US: with *Siderman de Blake v. The Republic of Argentina* (rejecting an exception to State immunity for acts of torture); *Princz v. Federal Republic of Germany* (no exception to immunities for forced labour in Nazi camps); *Hwang Geum Joo et al. v. Japan* (holding Japan's immunities in the case of 'comfort women'); Germany: *Distomo Case*. Only the Italian (in *Ferrini v. Germany*) and the Greek courts (in *the Distomo Massacre* case) held an opposite position, which the ICJ ultimately declared to be in violation of international law (*Jurisdictional immunities* case).

21. On the overall, claims of violations of *jus cogens* are not sufficient to create a judicial remedy or right of action, unless some other rule of domestic or international law drew particular consequences from it. While it is certain that the fundamental values protected by *jus cogens* informed developments in the field of procedural law, the judicial guarantees for protecting these values still need to be established by specific rules. Neither the domestic judge or the international judge for that purpose could fill in the legal lacunae, particularly when there appears to be no international consensus on this point.

3. Invalidating effect of international jus cogens

22. As stated in Art. 53 and 64 VCLT, the main function of *jus cogens* in international law is to invalidate international acts incompatible with it. There is virtually no domestic case where the invalidity of a treaty was sought on this basis. Concerning acts of international organizations, the Court of First Instance of the European Union boldly held that it was "empowered to check, indirectly, the lawfulness of the resolutions of the Security Council (…) with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible." Its position was widely criticized and the ECJ annulled it, on ground that it is not for the Community judicature to review the lawfulness of resolutions adopted by an international body, even if that review were to be limited to examination of the compatibility of that instrument with *jus cogens* (ECJ, *Kadi et al. v. Council of the European Union*, §§ 281-286).

23. Equally unconvincing is the opinion of the Constitutional Court of Russia, which after defining the principles protecting sovereign equality of States as being *jus cogens* norms, it used them to invalidate in the domestic legal order the domestic implementation of judgments of the ECHR:

> "If the European Court of Human Rights (…) gives to a notion used in the Convention a meaning other than the ordinary one or carries out interpretation contrary to the object and purpose of the Convention, the state, in respect of which the judgment has been passed on this case, has the right to refuse to execute it as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention. (…) [This interpretation] was carried out in violation of the general rule of interpretation of treaties, the meaning of this provision will diverge from imperative norms of customary international law (*jus cogens*), to which without doubts the principle of sovereign equality and respect for rights inherent in sovereignty and the principle of non-interference with internal affairs of states belong." (*Opinion no. 832/2015*)

24. On the overall, domestic judges prove open to the use of international *jus cogens*. Yet, the uncertainties that surround it in international law (as to the nature, definition and above all functions) are also present in domestic jurisprudence. Despite these shifting grounds, there is no doubt that, through these massive references and cross-reference, domestic jurisprudence takes part to the development of international *jus cogens*. The best example of an international effect of domestic jurisprudence comes from the fact that the ILC itself, in its work on jus cogens, relies extensively upon domestic decisions.

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SELECT BIBLIOGRAPHY

L Alexidze ‘The Legal Nature of *Ius Cogens* in Contemporary International Law’ (1981-III) 172 RdC 233–242.

G Gaja ‘Jus Cogens beyond the Vienna Convention’ (1981 III) 172 RdC 271–316.

A Gómez Robledo ‘Le jus cogens international: Sa genèse, sa nature, ses fonctions’ (1981 III) 172 RdC 9–217.

M. Gebauer ‘Ordre public (Public Policy)’ MPEPIL (online edition 2007).

L Hannikainen *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status* (Lakimiesliiton Kustannus 1988).

F Hoffmeister & Th Kleinlein ‘International Public Order’ MPEPIL online (2013).

R Kolb *Théorie du jus cogens international: Essai de relecture du concept* (Presses Universitaires de France 2001).

R Kolb *Peremptory International Law - Jus Cogens: A General Inventory* (Hart Publishing 2015).

A Orakhelashvili *Peremptory Norms in International Law* (OUP 2006).

D Shelton (ed) *International Law and Domestic Legal Systems* (OUP 2011)

D Tladi ‘First report on *jus cogens*’ (ILC doc A/CN.4/693 2016).

D Tladi ‘Second report on jus cogens’ (ILC doc A/CN.4/706 2017).

Venice Commission ‘On the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Interim Opinion no 832/2015.

T Weatherall *Jus Cogens: International Law and Social Contract* (CUP Cambridge 2015).

CASE-LAW

International Court of Justice (ICJ)

The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment, ICJ Reports 1949, p. 4

Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, ICJ Reports 1951, p. 15.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Reports 1970, p. 3.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.

East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 90.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, ICJ Reports 2012, p. 99.

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422.

International Criminal Tribunal for the former Yugoslavia (ICTY)

Prosecutor v. Furundžija, Judgment, IT-95-17/1-T (1998).

National court decisions

Argentina
Chile v. Arancibia Clavel, Supreme Court of Justice (Argentina), A/533/XXXVIII, ILDC 1082 (2004).

Canada
Suresh v. Canada (Minister of Citizenship and Immigration), Supreme Court (Canada), [2002] 1 SCR 3 (2002).
Bouzari v. Islamic Republic of Iran, Court of Appeal for Ontario (Canada), 71 OR (3d) 675 (2004).

Colombia
Constitutional Case No. C-225/95, Constitutional Court of Colombia, No. C-225/95 (1995).
Decision C-291/07, Complaint challenging the constitutionality of Articles 135, 156 and 157 (in part) of Act 599 of 2000, and Articles 174, 175, 178 and 179 of Act 522 of 1999, Constitutional Court of Colombia (2007)

France
Opinion, Conseil d'État, *Rapport public 2003, Perspectives pour la fonction publique, Études et documents n°54* (La Documentation Française, 2003) 58.
Decision n°09-14743, *Réunion Aérienne v. Socialist People's Libyan Arab Jamahiriya, Court of Cassation* (Civil Chamber I)150 ILR 630 (2011).
Decision no 16-82664, Court of Cassation (Criminal Chamber) (2016).

Germany
East German Expropriation Case, *Mr von der M*, BVerfG [Constitutional Court], 2 BvR 955/00, ILDC 66 (2004).
Distomo Case, Federal Supreme Court (Bundesgerichtshof), BGH III ZR 245/98 (2003).

Greece
Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre Case), Court of Cassation (Areios Pagos), No. 11/2000, 129 ILR 513 (2000).

Israel
Attorney-General (Israel) v. Eichmann, Supreme Court, 36 ILR 5 (1962).

Italy
Ferrini v. Germany, Court of Cassation (Civil Section), No. 5044/2004, ILDC 19 (2004).
Germany v. De Guglielmi et al., Court of Appeal, No. 941/2012, ILDC 1905 (2012).
Germany v. Mantelli and ors, Court of Cassation, No. 14201/2008, ILDC 1037 (2008).
Germany v. Milde, Court of Cassation (First Criminal Section), No. 1072/2009, ILDC 1224 (2009).
Judgment no 238, Constitutional Court, QIL, Zoom out II (2014), 5-47.
Decision N° 46634, Court of Cassation (Criminal Section), QIL, Zoom out II (2014).

Kenya
Kenya Section of the International Commission of Jurists v. Attorney General et al., High Court (Kenya), [2011] KLR, ILDC 1804 (2011).

Russia
On the Application of Universal Recognised Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction, Ruling no 5, Constitutional Court (2013).
Judgment no 12-P/2016 'in the case concerning the resolution of the question of possibility to execute the Judgment of the European Court of Human Rights of 4 July 2013 in the case of Anchugov and Gladkov v Russia in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation', Constitutional Court (2016).

South Africa
Kaunda v. President of South Africa and ors, Constitutional Court, No. CCT 23/04, 2005 (4) SA 235 (CC), ILDC 89 (2004).

Switzerland

A. v. Federal Department of Economic Affairs, Federal Supreme Court, No. 2A 783/2006, ILDC 1200 (2008).
A. v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs (Al Dulimi), First Public Law Chamber (Switzerland), No. 1A 48/2007, ILDC 1201 (2008).
Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Federal Supreme Court (Switzerland), No. 1A 45/2007, ILDC 461 (2007).
A. *(Kahled Nezzar) v. Office of the Attorney General*, Federal Criminal Court, No. BB.2011.140 (2012).

United Kingdom
R., ex parte Pinochet v. Bartle and Others, [1999] UKHL 17.

United States
Filártiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980).
Siderman de Blake v. Argentina, 965 F 2d 699 (9th Cir. 1992).
Princz v. Federal Republic of Germany, 26 F.3d 1166 (DC Cir. 1994).
Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir.2005).
Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1209 (9th Cir.2007).
Belhas v. Ya'alon, 515 F.3d 1279 (DC Cir. 2008).
Matar v. Dichter, 563 F.3d 6 (2nd Cir. 2009).
Devi v. Rajapaksa, No. 11 Civ. 6634, 2012 WL 3866495 (S.D.N.Y. Sept. 4, 2012).
Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012) cert. denied, 134 S. Ct. 897 (US 2014).

European Union
Kadi v Council of the European Union and Commission of the European Communities, Judgment of first instance, Case no T-315/01; (2005) ECR II-3649.
Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, Appeal judgment, Case nos C-402/05 and C-415/05; (2008) ECR, I-6351.